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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRUCE "MAX" DAVIS, an individual; BLINDSIDE ENTERTAINMENT LLC; KIMAN/GROWTH MUSIC PUBLISHING; HEATHER AZURE KIRKBRIDE, an individual; and GLOBAL DATA REVENUE, INC.,)	Case No. CV 11-02674 DDP (RZx)
)	
)	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
)	
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)	
Plaintiffs,)	
)	
v.)	
)	
AT&T WIRELESS SERVICES INC.; CELLCO PARTNERSHIP, a New Jersey Corporation doing business as Verizon Wireless; SPRINT SPECTRUM LP, a Delaware limited partnership; T-MOBILE, USA, a Washington corporation; TRACFONE WIRELESS INC., a Delaware corporation,)	[Docket No. 54]
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)	
Defendants.)	
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Presently before the court is Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion"). Having reviewed the parties' moving papers and heard oral argument, the court GRANTS the Motion, and adopts the following Order.

1 **I. BACKGROUND**

2 In 2010, Luvdarts LLC and Davis-Reuss, Inc., dba DigiPie
3 ("Luvdarts Plaintiffs") filed suit against four of the five
4 wireless carriers named in the present action, alleging copyright
5 infringement and unfair competition claims. See Luvdarts LLC v.
6 AT&T Wireless Servs. Inc., No. CV 10-5442 (filed July 23, 2010).
7 Plaintiff Bruce Max Davis ("Davis") is the President, Chief
8 Operating Officer, and Founder of one of the Luvdarts Plaintiffs,
9 and Managing Member of the other. He is also the Founder and
10 controlling principal of current Plaintiff Global Data Revenue,
11 Inc. ("GDR"). In the prior action, the Luvdarts Plaintiffs argued
12 that the defendant wireless carriers failed to prevent their
13 subscribers from infringing Plaintiffs' copyrighted content by
14 sending the content via the carriers' multimedia messaging services
15 ("MMS"). This court dismissed the case with prejudice on March 17,
16 2011, concluding that the wireless carriers were not liable as a
17 matter of law.

18 On March 30, 2011, Davis filed the present action, bringing
19 various antitrust and related claims against Defendants. On
20 September 8, 2011, the court granted, with leave to amend,
21 Defendants' unopposed Motion to Dismiss Plaintiff's Complaint.
22 Davis filed a First Amended Complaint ("FAC") and purported class
23 action on September 27, 2011, adding three new Plaintiffs -
24 Blindside Entertainment LLC, Kiman/Growth Music Publishing, Heater
25 Azure Kirkbride, and GDR (collectively "Plaintiffs"). The FAC
26 again alleges antitrust violations of the Sherman Act and
27 California's Cartwright Act, as well as state law claims for unfair
28 competition and unjust enrichment. Specifically, Plaintiffs assert

1 that Defendants unlawfully conspired to: (1) not employ "standard
2 methods of protection for . . . copyrighted works," which wireless
3 subscribers can therefore send to one another without authorization
4 from copyright holders; and (2) not pay the "content
5 producers/owners" any of the revenue Defendants earn from their
6 subscribers sending such content via MMS. (FAC ¶¶ 46-50, 72-78,
7 89.) Defendants filed this Motion to Dismiss the FAC on November
8 7, 2011.

9 **II. LEGAL STANDARD**

10 Federal Rule of Civil Procedure 12(b)(6) requires courts to
11 dismiss claims for which no relief can be granted. When
12 considering a 12(b)(6) motion, "all allegations of material fact
13 are accepted as true and should be construed in the light most
14 favorable to the plaintiff." Resnick v. Hayes, 213 F.3d 443, 447
15 (9th Cir. 2000). In Ashcroft v. Iqbal, the Supreme Court explained
16 that a court should first "identify[] pleadings that, because they
17 are no more than conclusions, are not entitled to the assumption of
18 truth." 129 S. Ct. 1937, 1950 (2009). Next, the court should
19 identify the complaint's "well-pleaded factual allegations, . . .
20 assume their veracity and then determine whether they plausibly
21 give rise to an entitlement to relief." Id.; see also Moss v. U.S.
22 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) ("In sum, for a
23 complaint to survive a motion to dismiss, the non-conclusory
24 factual content, and reasonable inferences from that content, must
25 be plausibly suggestive of a claim entitling the plaintiff to
26 relief." (internal quotation marks omitted)).

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1 **III. DISCUSSION**

2 Among other things, Defendants argue that Plaintiffs fail to
 3 state any plausible claim for relief, because they do not allege
 4 the required "antitrust injury." As an initial matter, the court
 5 notes that Plaintiffs failed to respond to this argument in their
 6 Opposition to the Motion. Nonetheless, the court has considered
 7 the merits of the issue, and agrees with Defendants.

8 To have standing to bring an antitrust action, a plaintiff
 9 must show an "injury of the type the antitrust laws were intended
 10 to prevent and that flows from that which makes defendants' acts
 11 unlawful." Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d
 12 1096, 1102 (9th Cir. 1999) (internal quotation marks omitted). In
 13 addition, the plaintiff must be a "participant in the same market
 14 as the alleged malefactors." Glen Holly Entm't, Inc. v. Tektronix,
 15 Inc., 352 F.3d 367, 372 (9th Cir. 2003) (internal quotation marks
 16 omitted).

17 Plaintiffs are producers and owners of multimedia content.
 18 (See FAC ¶ 12 ("Davis is a developer and investor in . . .
 19 multimedia content"); ¶ 13 ("Blindside produces and owns
 20 short films including . . . music videos"); ¶ 14 ("Kiman
 21 publishes, distributes and owns music recordings."); ¶ 15
 22 ("Kirkbride . . . creates digital photos and designs"); ¶
 23 16 ("[GDR] was created . . . for the express purpose of working
 24 with Defendants to protect . . . multimedia content
 25 producers/owners." (emphasis omitted)).) Defendants, to the
 26 contrary, are wireless service carriers, who - among other things -
 27 enable subscribers to send messages that can include multimedia
 28 content. (See FAC ¶¶ 1-2.) Plaintiffs and Defendants are

1 therefore not participants in the same market, and Plaintiffs fail
2 to allege the required antitrust injury.

3 In addition, as Defendants explain, and Plaintiffs do not
4 dispute, Plaintiffs' state law claims are entirely dependent on
5 Plaintiffs' antitrust claims. Accordingly, because Plaintiffs'
6 fail to allege plausible antitrust claims, their state law claims
7 fail as well.

8 **IV. CONCLUSION**

9 For all these reasons, the court GRANTS Defendants' Motion to
10 Dismiss Plaintiffs' First Amended Complaint with prejudice, because
11 the Complaint is not susceptible to being cured.

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13 IT IS SO ORDERED.

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16 Dated: March 1, 2012


DEAN D. PREGERSON
United States District Judge